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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/674,710	09/29/2003	Robert G. Turcott	A03P3004-US1	4592
24473	7590	12/19/2006		
STEVEN M MITCHELL PACESETTER INC 701 EAST EVELYN AVENUE SUNNYVALE, CA 94086			EXAMINER SMITH, TERRI L	
			ART UNIT	PAPER NUMBER
			3762	
			MAIL DATE	DELIVERY MODE
			12/19/2006	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/674,710

Applicant(s)

TURCOTT, ROBERT G.

Examiner

Terri L. Smith

Art Unit

3762

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 30 November 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

TS
08 December 2006

EVANISKO
PRIMARY EXAMINER

Continuation of 11. does NOT place the application in condition for allowance because: With regard to Applicant's arguments, prosecution on the merits is closed. Applicant's arguments against the Bornzin et al., U.S. Patent 5,549,650 reference are a repeat of Applicant's arguments in the REMARKS that were filed on 04 May 2006. Examiner responded to Applicant's arguments in the Office Action mailed on 11 October 2006, but Applicant has not addressed the Examiner response. Consequently, Examiner repeats the response herein below as stated in said Office Action. Additionally, Applicant's statements pertaining to the specification are moot because, although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). For example, "transient" is a relative term and, although the Bornzin et al. test may take about a day to do the test, it is still a transient period over a year interval and no amount of time is listed in the claims as to how long the tests take. Similarly, stating that Bornzin et al. utilize a large number of cardiac beats to determine the cardiac performance for a particular combination of control parameters is irrelevant because the claim limitations do not list an amount of data. Consequently, Bornzin et al. teaches the claimed limitations as set forth in the present application.

As stated in the Office Action mailed on 11 October 2006, Examiner respectfully disagrees with Applicant's argument that Bornzin et al. do not disclose or suggest estimating optimal control parameters for maximizing cardiac performance based on the values representative of transient cardiac performance as recited in claim 1 of the present application. Bornzin et al. disclose the claimed limitation at column 5, lines 5-12 and column 19, line 36-column 21, line 30 as stated in the Office Action mailed on 07 February 2006. Specifically, the estimating step is shown as averaged/average functions of the processor, 28 in column 20 lines, 53-65 and column 21, lines 4-30 where the estimated (averaged) optimal control parameters are HRsubOPT, AVsubOPT and PsubOPT as described in the function of the processor, 28. Further, the processor provides the information it gathers from the values representative of transient cardiac performance (AV, HR) to maximize cardiac performance as described in the cited Bornzin et al. references herein above, and as recited in claim 1 of the present application.